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No. 00-466

In The

Supreme Court of the United States

MELVIN I. UROFSKY, PAUL SMITH, BRIAN J. DELANEY, DANA HELLER, BERNARD H. LEVIN, and TERRY L. MEYERS,

Petitioners,

v.

JAMES S. GILMORE, III, GOVERNOR, Commonwealth of Virginia,

Respondent.

On A Petition For Writ Of Certiorari To The Fourth Circuit Court Of Appeals

BRIEF OF JAMES S. GILMORE, III, GOVERNOR OF THE COMMONWEALTH OF VIRGINIA, IN OPPOSITION

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QUESTIONS PRESENTED

Respondent takes issue with petitioners' statement of Questions Presented and re-states the question as follows:

> The Commonwealth of Virginia has instructed its employees not to use state computers to access or display lascivious, sexually explicit materials, except to the extent required in conjunction with a bona fide agency-approved research project or other agency-approved undertaking.
>
> 1. Do state employee petitioners have a First Amendment right to disregard these instructions on computer use and decide for themselves whether such materials are required for their professional, employment-related research and writing needs?
>
> 2. Do petitioners have standing to bring this issue before the Court?

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BRIEF OF JAMES S. GILMORE, III, GOVERNOR OF THE COMMONWEALTH OF VIRGINIA, IN OPPOSITION

Respondent James S. Gilmore, III, Governor of the Commonwealth of Virginia, respectfully submits this brief in opposition to the petition for writ of certiorari.

STATEMENT OF THE CASE

This case involves the constitutionality of a Virginia law regulating the use of state-supplied computers by state employees, Va. Code § 2.1-804 *et seq.* ("the Act"). The heart of the Act provides:

> Except to the extent required in conjunction with a bona fide, agency-approved research project or other agency-approved undertaking, no agency employee shall utilize agency-owned or agency-leased computer equipment to access, download, print or store any information infrastructure files or services having sexually explicit content.

Va. Code § 2.1-805.

The term "sexually explicit content" is narrowly defined to mean content in which certain "lascivious" descriptions or depictions are the "dominant theme." Va. Code § 2.1-804. This narrow definition was added to the statute *after* the decision by a three-judge panel of the court of appeals but *before* the case was argued *en banc*. 1999 Va. Acts, ch. 384. The amendment undermines the standing of petitioners who do not allege an interest in using lascivious materials. *See infra* at 5.

No penalties are provided for violating the Act. It is, instead, a legislatively adopted personnel rule, the enforcement of which is left to state agencies through the employee disciplinary and grievance procedures ordinarily in force. Similarly, the Act does nothing to disturb tenure protections at state universities.

The court of appeals took pains to note the Act's limited reach. "[S]tate employees remain free to access sexually explicit materials from their personal or other computers not owned or leased by the state." Pet. App. at 6a. The court of appeals also noted that state employees may still access sexually explicit materials using a state computer so long as "the agency head deems such access to be required in connection with a bona fide research project or other undertaking." *Id.* Although not addressed within the four corners of the Act, the record shows that agency heads may delegate responsibility for approving requests to administrators more closely connected to the work of employees making such requests. *See, e.g.*, Pet. at 5. "Virginia's colleges and universities have delegated primary approval authority to officials such as deans and department heads." Pet. App. at 60a.

Petitioners are a group of six state employees who challenged the Act on its face and as applied. They have renounced any claim to use state computers for "personal entertainment or enlightenment." Joint Appendix to the Circuit Court ("J.A.") at 56. Instead, they base their case "solely" on what they claim are "their professional, employment-related needs." *Id. See also* Brief of Appellees to the Circuit Court ("Br. of Appellees") at 25 (describing case as involving "professional, work-related communications"). Although petitioners are all professors at state

institutions of higher education, they did not originally base their claim principally on their status as academics. Instead, they relied on their more general status as employees of state government. Thus, in the decision of the district court, the term "academic freedom" does not appear.

In the court of appeals, petitioners changed direction and placed new emphasis on claims of academic freedom, arguing that the Act unconstitutionally interfered with both their research and teaching responsibilities. Br. of Appellees at 7. Coming before this Court, however, petitioners have abandoned their claim that the Act interferes with their *teaching* responsibilities. Their questions presented deal exclusively with "job-related research and writing" and they have expressly abandoned "any issue regarding control over curriculum content." Pet. at 12, n.8. Petitioners have also abandoned their claims of vagueness and overbreadth. Those issues do not appear in their questions presented. By so narrowing the case, petitioners have lost any standing they might otherwise have. *See infra* at 5.

Disdaining any supervision by their institutions, none of the petitioners has requested or been denied permission to access sexually explicit materials as provided by the Act. *Id.* Instead, petitioners attempt to characterize the approval process as unreasonable. They say that "[o]ne professor at the College of William and Mary received approval in connection with a scholarly journal . . . but other members of the staff and editorial board of the journal did not." Pet. at 5. What petitioners fail to disclose is that *no one else* from the journal *sought* approval. As the court of appeals noted, "no request for

access to sexually explicit materials on computers owned or leased by the state has been declined." Pet. App. at 6a. Indeed, the record contains various examples of professors' requesting and receiving approvals from their institutions to use state computers for sexually explicit materials. J.A. at 217-22, 287-89, 387-88 and 390. If any petitioners truly need lascivious, computerized materials for their job-related research and writing, they need only ask.

In support of their claim that the Act inhibits scholarly work and violates academic freedom, petitioners cite what they term the "Statement of Undisputed Facts, ¶¶ 32-98, Joint Appendix to Court of Appeals at 238-66. . . . " Pet. at 4-5. This is potentially misleading. The Commonwealth does not agree that the Act inhibits scholarly work or violates academic freedom. Moreover, the "Statement of Undisputed Facts" to which petitioners repeatedly refer is *not* a court-generated finding of fact, nor is it a document mutually agreed to by the parties. It is a statement crafted by petitioners *unilaterally* and included in the memorandum filed by them in support of their motion for summary judgment in the district court. Such a unilateral statement of allegedly undisputed facts is required by the rules of the district court. Rule 56(B), Rules of the U. S. District Court for the Eastern District of Virginia. It does not bind the Commonwealth or govern this case.

REASONS FOR DENYING THE WRIT

Summary

This case is not worthy of certiorari. It is beset by an array of standing problems that arise from a legislative narrowing of the Act and petitioners' abandonment of key issues. It fails to present any significant conflict. While the petition is replete with allegations of conflict, those allegations are based on an exaggerated view of the ruling below and on cases that are not pertinent to the questions presented by the petition. The case is further complicated by defenses advanced by the Commonwealth but which the Fourth Circuit majority never needed to reach. These defenses invoke forum analysis as well as the secondary effects doctrine. Additionally, as shown by the opinion of Chief Judge Wilkinson (concurring in the judgment), the Act passes muster under the *NTEU/Pickering* balancing test. These defenses further detract from the worthiness of this petition. Certiorari should be denied.

1. Petitioners No Longer Have Standing.

When this case began, petitioners argued that the Act's definition of sexually explicit content was so broad as to include not just *lascivious* material but also research and debate on non-lascivious sexual themes in art, literature, history, law, medicine and psychology. *See* Pet. App. at 94a. Some petitioners claimed that the Act interfered with their ability to use materials that were lascivious, while others said the Act interfered with their ability to use other materials that were sexually explicit in the broad sense, but that were not necessarily lascivious. The

Commonwealth disagreed with petitioners' broad interpretation and insisted that only lascivious materials were covered by the Act. A three-judge panel of the court of appeals agreed with petitioners. Pet. App. at 84a, n.6. In response, the 1999 General Assembly promptly amended the definition of "sexually explicit content" so as to include an express requirement that the dominant theme be lascivious. It was this amended law that was reviewed by the *en banc* decision of the court of appeals.

By amending the Act to add a requirement of lasciviousness, the General Assembly satisfied any concerns that might otherwise have been raised by petitioners desiring to use *non*-lascivious materials. They no longer have standing and their cases are now moot. Curiously, *none* of the petitioners has told this Court that the materials they seek to use meet the Act's requirement for lasciviousness. This alone is enough to raise serious questions about standing so as to make a grant of certiorari inappropriate.

When this case began, it also included the use of state computers for *all* types of sexually explicit speech by state employees so long as the speech was part of "their professional, employment-related needs." J.A. at 56. Now, however, they have expressly disclaimed any issues related to control of curriculum. Pet. at 12, n.8. Issues of vagueness and overbreadth are also wholly absent from their questions presented. They now limit their questions presented to "job-related research and writing." Thus, they have mooted out the cases of various petitioners, including those most arguably involved with lascivious material. For example, the lead petitioner, Melvin I. Urofsky, rests his claim of standing on the allegation that

"he had been unable to assign students online research assignments regarding federal indecency law because of the Act." Pet. at 4. Teaching assignments are part of the curriculum. Since control over curriculum is no longer in dispute, the effect of the Act on Professor Urofsky's teaching assignments is no longer an issue.

Similarly, petitioners have mooted out the case of Paul Smith. His claim of standing rested on a decision by university administrators to delete from their university's website clearly pornographic images that Smith had posted there. Pet. at 4.[1] Since none of the photographs was accompanied by any explanatory text, they do not fall within the category of research and writing. Thus, Professor Smith's right to display those pornographic images on his university's website is outside the scope of the questions presented.

Another petitioner, Terry L. Meyers, suggests that the Act compromises his ability to conduct research on "material supplied by the Commonwealth for the use of its scholars on its own Virtual Library of Virginia ('VIVA')

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[1] The Smith photographs included the following: (i) a naked man in bondage, J.A. at 170; (ii) the bare buttocks of a woman whose hands are chained and locked behind her, J.A. at 178; (iii) a naked woman hanging spread-eagle in bondage, J.A. at 179; (iv) a naked man stroking his erect penis, J.A. at 181; (v) a woman exposing her pierced and gaping rectum and vagina, J.A. at 182; and (vi) a woman anally penetrating a man using a strap-on dildo, J.A. at 183. Another photograph, not reproduced in the record, showed former child pornography star, Traci Lords, engaged in sexual intercourse. Petitioners' statement that the images were posted on *Smith's* website is misleading. All photographs bore the electronic address of George Mason University, http://mason.gmu.edu.

database." Pet. at 4. Assuming *arguendo* that the Victorian poetry that interests him is predominantly lascivious, he still has no standing. The statutory scheme contains an exemption for materials in VIVA. *See* Va. Code § 18.2-391.1.[2] While the court of appeals upheld the Act without discussing the limitations found in § 18.2-391.1, any assessment of petitioners' standing must include an evaluation of those limitations.

Finally, there is yet another problem with petitioners' standing. When this case began, they raised a *facial* challenge to the Act, and, in so doing arguably made relevant the constitutionality of the Act in all of its possible applications. Now, given the narrowness of their questions presented, the facial challenge has been abandoned. Instead, the Act is only challenged as it applies to the "job-related research and writing" of state employees. Yet even if one or more petitioners still had standing to

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[2] VIVA is an on-line library supported by a consortium of academic libraries in Virginia. *See, e.g.*, 1996 Va. Acts, ch. 1056, item 183(G). The Act defines "lewd exhibition of nudity," "sexual conduct," "sexual excitement" and "sadomasochistic abuse" by reference to Va. Code § 18.2-390, but the reach of that section is expressly limited by § 18.2-391.1: "Nothing contained in this article shall be construed to apply to: (1) The purchase, distribution, exhibition, or loan of any work of art, book, magazine, or other printed or manuscript material by any accredited museum, library, school or institution of higher learning." Thus, when Virginia's libraries and institutions of higher education – acting individually or collaboratively – place material "on-line," such electronic "distributions" and "exhibitions" are not covered by § 18.2-390, nor by the Act's incorporation of that section.

challenge the Act as applied to his or her own circumstances, none would have standing to challenge the Act as applied to anyone else. This means petitioners have no standing to challenge the Act as it applies to non-academic state employees. Indeed, since this is a not a class action, petitioners also lack standing to challenge the Act as it applies to other academics. Very little of the case is left and, as shown above, the lack of fit between the activities they allege and the questions they present deprive them of any standing whatsoever to challenge the Act as amended.

2. There Is No Conflict On Academic Freedom.

Petitioners' discussion of academic freedom exaggerates the issue in this case. They attribute to the Fourth Circuit the view that "state-employed professors have no first amendment-based right of academic freedom." Pet. at 11. The Fourth Circuit made no such sweeping pronouncement. Instead, the court focused on a much narrower subject: "The speech at issue here [is] access to certain materials using computers owned or leased by the state for the purpose of carrying out employment duties. . . . " Pet. App. at. 12a. Thus, the ruling below says nothing about the rights of professors to access materials using their own computers or for their own purposes. Moreover, "none of the [petitioners] have ever sought permission to access any materials on the Internet pursuant to the terms of the Act." *Id.* at n.7. Thus, the ruling below says nothing about the rights that a professor might be able to assert if a request contemplated by the Act were unreasonably denied by the institution. Finally,

the ruling below says nothing about what rights of academic freedom any professors may have as a result of their contracts with their institutions.[3] The issue in this case must be narrowed yet again by the limitations found in the questions presented by petitioners. Those questions deal exclusively with "job-related research and writing." None of their questions deals with classroom speech or curriculum, those issues having been expressly abandoned. Pet. App. at 12, n.8. In sum, the "academic freedom" issue in this case is very narrow and may be phrased as follows: *Do individual academic employees of the state have a First Amendment right to disdain supervision of their institutions and to decide unilaterally what materials and resources are required for their professional, employment-related research and writing needs?* Petitioners fail to show any conflict whatsoever on this question.

Petitioners cite several decisions by this Court extolling academic freedom; however, those decisions deal with issues far removed from the relatively mundane issue presented here and present no conflict. *See, e.g., Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978) (discussing right of institution to decide who may be admitted); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (prohibiting university from discriminating against student publication based on its religious viewpoint); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957)

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[3] *See, e.g.*, Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 Tex. L. Rev. 1265 (1988) (arguing that definition and boundaries on constitutional academic freedom are significantly different from those concepts of academic freedom formulated by the academic profession itself).

(overturning contempt conviction of professor for refusing to answer questions about subversive activities); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (prohibiting state from disqualifying professor from employment based on refusal to take loyalty oath); *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990) (allowing federal agency to subpoena tenure files of private university); *Board of Educ. v. Pico*, 457 U.S. 853 (curtailing authority of local school board to remove library books based on viewpoint); *Board of Regents v. Southworth*, 529 U.S. 217 (2000) (upholding viewpoint neutral mandatory student activity fee); *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985) (upholding authority of state university to dismiss student for academic deficiencies).

Their circuit cases dealing with academic freedom likewise present no conflict. Most of these cases involve disputes about classroom speech and curriculum, areas that are no longer at issue in this case.[4] Two of their circuit cases involved speech to the university community

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[4] *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (speech at issue was racial epithet used by basketball coach during motivational speech to his players); *Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9th Cir. 1996), *cert. denied*, 520 U.S. 1140 (1997) (professor disciplined under new, vague sexual harassment policy for longstanding – and previously accepted – teaching style); *Dube v. State Univ. of N.Y.*, 900 F.2d 587 (2nd Cir. 1990), *cert. denied*, 501 U.S. 1211 (1997) (speech at issue was discussion of controversial topic in classroom); *Parate v. Isibor*, 868 F.2d 821 (6th Cir. 1989) (speech at issue was professor's assignment of grade to student); *Blum v. Schlegel*, 18 F.3d 1005 (2nd Cir. 1994) (professor allegedly disciplined for criticizing drug control laws in class and in campus publications).

through campus media, a category of speech that is also different from the speech at issue in the questions presented.[5] Only *one* of Petitioners' circuit cases deals with research and writing, *Dow Chemical Co. v. Allen*, 672 F.2d 1262 (7th Cir. 1982). Even *Dow* is inapposite because it involved a conflict between state university researchers and *private* parties who sought access to that research through a federal subpoena *duces tecum*. Moreover, in *Dow*, the state employer was aligned on the side of its researchers. Thus, the case says nothing about what research rights state-employed academics may have in opposition to their employer.

3. There Is No Conflict On Whether "Job-Related" Speech Can Be On "A Matter of Public Concern."

Petitioners contend that the decision below conflicts with decisions of this Court and other federal circuits on whether public employees have a First Amendment right in their "job-related research and writing." Pet. at 16. Their allegation of conflict is based on a semantic sleight of hand that switches back and forth between two fundamentally different meanings of the term "job-related." In the narrow sense, speech by an employee may be described as "job-related" only if it is made by the employee as part of the *performance* of his employment duties. The question is not whether the employee acts as a "government mouthpiece," but whether the speech is

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[5] *Burnham v. Ianni*, 119 F.3d 668 (8th Cir. 1997) (speech at issue was photography provided by professors for inclusion in student-organized exhibition appearing in university display case). *See also Blum, supra* at n.4.

part of the work the employee was hired to do. This Court has never suggested that government employees have a free speech right to be immune from supervision by their employers. (Were it otherwise, law clerks would not be accountable to the judges who hire them.) In a much broader sense, however, the term "job-related" may be used to refer to speech that is *not* part of an employee's work, but that is *about* his job or *about* his employer. Under this Court's precedents, such speech may or may not be constitutionally protected, depending on whether it is on a matter of public concern. *Connick v. Myers*, 401 U.S. 138 (1983).

In the case at bar, only the narrow type of "job-related" speech is at issue. That is to say, the only category of speech implicated by the decision below is speech made by state employees in the performance of their job duties. This is shown by petitioners' statement that they base their case "solely" on what they claim are "their professional, employment-related needs." J.A. at 56. It is also shown by the court of appeal's statement limiting "the speech at issue" to certain materials used for "carrying out employment duties." Pet. App. at 12a. Finally, it is shown by the examples of speech that petitioners allege are impinged by the Act. Pet. at 3-4. The various professorial tasks described by the petition are all part of the scholarly work petitioners are paid to do.

By contrast, petitioners attempt to show a conflict by citing decisions that involve the broader type of "job-related" speech. The four decisions they cite from this Court plainly fall into the second category. In *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), a public school teacher was dismissed for publishing in a local newspaper a

letter criticizing how the school board had handled proposals to raise revenues. There is no suggestion that communicating with the news media was part of the teacher's job. He acted as a private citizen.

In *Connick v. Myers*, 461 U.S. 138 (1983), an assistant district attorney, unhappy with a change of duties, distributed a questionnaire to her co-workers inquiring about a range of subjects. *Id.* at 141. Some of her questions "pertain[ed] to the confidence and trust that [her] co-workers possess[ed] in various supervisors, the level of office morale, and the need for a grievance committee" and were merely extensions of her dispute over her own transfer. *Id.* at 148. Another question asked whether her co-workers ever felt "pressured to work in political campaigns on behalf of office supported candidates" and was clearly a matter of public concern. *Id.* at 149. While the Court treated these sets of questions differently, *none* of this speech was in the discharge of the duties the plaintiff had been hired to perform. Thus, *Connick* furnishes no precedent for restricting the ability of government to control the content of speech forming part of its employees' work.

In *Waters v. Churchill*, 511 U.S. 661 (1994), a public hospital fired a nurse who had allegedly criticized hospital policies while conversing on break with a co-worker. What the nurse actually said was disputed; however, no one alleged that her remarks were part of her job. The case is predominantly directed toward resolving what investigative standard should apply when the content of an employee's comments are in dispute. The Court concluded that even if one version of the conversation

warranted constitutional protection, "the potential disruptiveness of the speech *as reported* was enough to outweigh whatever First Amendment value it might have had." *Id.* at 680 (emphasis added). Thus, *Waters* is also inapposite.

United States v. National Treasury Employees Union ("*NTEU*"), 513 U.S. 454 (1995), involved an honoria ban that applied to writings and other expressive activities having no nexus to the employees' federal employment.[6] Justice Stevens, writing for the majority, took pains to emphasize the fact that such employees staked no constitutional claim involving their official duties.

> They seek compensation for expressive activities in their capacity as citizens, not as Government employees. . Neither the character of the authors, the subject matter of their expression, the effect of the content of their expression on their official duties, nor the kind of audiences they address has any relevance to their employment.

Id. at 465.

This case is not controlled by *NTEU*. It is *NTEU's* antithesis. Here, petitioners assert *only* a right as government employees to use state computers to access sexually explicit materials and to do so unconditionally. The decisions by this Court do not recognize such a right.

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[6] A postal employee in *NTEU*, for instance, sought compensation for lectures he gave on the Quaker religion. An aerospace engineer had been compensated to lecture on black history. There was an FDA microbiologist who critiqued dance performances, a Nuclear Regulatory Commission lawyer who penned articles about Russian history and a tax examiner who wrote articles about the environment. *Id.* at 461-62.

Similarly, almost all of the circuit cases cited by the petitioners deal with the broader category of "job-related" speech. For example, in *Sanjour v. EPA*, 56 F.3d 85 (D.C. Cir. 1995), two employees of the Environmental Protection Agency wished to travel on their own time to give their own, unofficial views at a public hearing on a proposed hazardous waste incinerator. The private group that organized the hearing offered to reimburse them for their travel expenses. There was, however, a federal ethics regulation that prohibited federal employees from accepting reimbursement for expenses incurred in connection with *unofficial* speaking engagements *relating* to official duties. Without the reimbursement, the two employees were unable to attend. *Id.* at 89. The D.C. Circuit applied the *Pickering/NTEU* balancing test and decided that the regulation was invalid. Unlike that regulation, there is nothing in the Act that restricts what state employees may say or do *outside* the workplace, nor is there anything in the Act that restricts how they may use *their own* computers. *Sanjour* is irrelevant.

Harman v. City of New York, 140 F.3d 111 (2nd Cir. 1998), involved a social welfare agency where press policies forbade employees from having media contact without first obtaining their employer's consent. ABC News contacted Harman, an agency employee, about a child allegedly beaten to death by her mother. Harman agreed to speak with ABC and did so off agency premises during her lunch hour. ABC later broadcast footage of her statement criticizing the agency. When the agency suspended her, she sued, claiming the media policy was unconstitutional. Harman's remarks were *about* her employer; they were not in the *performance* of her job. Her duties did not

include serving as a media spokesman. Thus, there is no conflict between *Harman* and the decision below.

Bonds v. Milwaukee County, 207 F.3d 969 (7th Cir. 2000), involved a city-employed fiscal analyst who, while participating in a community forum, was openly critical of the city's proposals on certain block grant programs. Thereafter, because of what it viewed as Bonds' poor judgment, disloyalty, and lack of discretion, a neighboring county withdrew an offer of employment it had previously made to Bonds. Bonds then sued the county. Whether his remarks at the forum are viewed as part of his work for the city or as purely private speech, they were not in the performance of any work for the county. In any event, Bonds lost. The peculiar facts of the case are too far removed from the case at bar to create any meaningful conflict.

In *Latino Officers Ass'n v. City of New York*, 196 F.3d 458 (2nd Cir. 1999), the issue was whether an organization of Latino police officers in New York City could wear their uniforms while marching in various ethnic parades. The court ruled in favor of the officers, based on the police department practice of allowing a competing group of Hispanic officers to wear their uniforms in similar parades. Marching in parades was not, however, part of the job duties of these officers. It was purely private speech by which, the court said, they reminded their community of their longstanding allegations of police department discrimination and misconduct. *Id.* at 466.

Two cases from the Ninth Circuit, *Nunez v. Davis*, 169 F.3d 1222 (9th Cir. 1999), and *Chateaubriand v. Gaspard*, 97

F.3d 1218 (9th Cir. 1996), involved the firing of public employees who objected to instructions that they engage *in unconstitutional political reprisals or in otherwise* unlawful political activity. As such, they are best viewed as "whistle-blowing" cases that are so far afield from the case at bar as to make them of no use in establishing a conflict.

In *Wilson v. UT Health Center*, 973 F.2d 1263 (5th Cir. 1992), the plaintiff was a campus police officer discharged for making a sexual harassment complaint that her employer said contained misrepresentations. While the court concluded that the plaintiff spoke "both as a citizen and an employee," it also concluded that she did not speak in the performance of her duties as a police officer. *Id.* at 1270. Thus, there is no conflict between *Wilson* and the case at bar. Petitioners also cite *Wilson* for the proposition that "denying First Amendment protection simply because speech is job-related [in the narrow sense] 'would permit public employers to remove constitutional protection from speech on certain subjects by including those subjects within employees' reporting duties.' " Pet. at 18, quoting *Wilson*, 973 F.2d at 1269. The simple answer to this concern is that courts are likely to see through any such pretext. Moreover, to the extent that there may be a need for special constitutional protection for the "whistler-blower," it is a concern completely foreign to the case at bar.

In *Harris v. Victoria Indep. Sch. Dist.*, 168 F.3d 216 (5th Cir.), *cert. denied*, 120 S.Ct. 533 (1999), several teachers were reprimanded and transferred to another school as a result of their speech at a committee meeting in which

they complained about their school principal. The transfers were overturned by the court. What is significant about *Harris* is that the committee where the plaintiffs spoke had been empanelled by the Texas legislature for the express purpose of improving the quality of the public schools. The case is best read as standing for the proposition that a state cannot ambush public employees by inviting them to express their concerns and then punishing them if it decides their views are unpleasant. These facts have no similarity to the case at bar.

Only two of the circuit decisions cited by petitioners involved speech by a public employee in the performance of his job duties: *Koch v. City of Hutchinson*, 847 F.2d 1436 (10th Cir.) (*en banc*), *cert. denied*, 488 U.S. 909 (1988) (fire marshal demoted, in part, for his written report expressing views that showed lack of professional judgment) and *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (speech at issue was racial epithet used by basketball coach during motivational speech to his players). But, in neither of those two cases did the employee prevail. Thus, even if those decisions contain expansive language suggesting a different analytical approach than the one followed by the Fourth Circuit, they do not furnish the sort of mature conflict that would merit the attention of this Court. *See Black v. Cutter Lab.*, 351 U.S. 292, 297 (1956) ("This Court . . . reviews judgments, not statements in opinions.").

4. There Is No Conflict Regarding "Prior Restraint."

Again, petitioners try to conjure up a conflict by disregarding the basic distinction between the job-

performance speech at issue here, and the purely private speech at issue in other cases. None of the cases they cite applies the prior restraint doctrine in the context of speech by employees in the performance of their employment duties.

The decisions from this Court on which petitioners rely are clearly inapposite. *See, e.g., Bantam Books v. Sullivan*, 372 U.S. 58 (1963) (state commission acted unconstitutionally by intimidating distributors and retailers of privately published books it deemed objectionable); *Freedman v. Maryland*, 380 U.S. 51 (1965) (state motion picture censorship statute held unconstitutional in criminal prosecution against private exhibitor who showed film without license); *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988) (ordinance requiring newspapers to obtain license before placing distribution racks on public property held unconstitutional); *NTEU* (law forbidding federal employees from receiving honoraria for speech held unconstitutional in context of speech having no nexus to employees' work) (*see supra* at 15); and *Playboy Entertainment Group v. U.S.*, 120 S.Ct. 1878 (2000) (federal statute requiring cable operators to scramble or block sexually oriented programs held unconstitutional). In short, petitioners have not cited *any* prior restraint decisions by this Court involving speech by public employees in the performance of their job duties.

The circuit court decisions cited by petitioners are likewise inapposite. *See Sanjour v. EPA*, 56 F.3d 85 (D.C. Cir. 1995) (ban on federal employees' accepting privately-paid compensation for speaking on agency-related matters held unconstitutional when employees were

speaking in unofficial capacity) (*see supra* at 16); *Harman v. City of New York*, 140 F.3d 111 (2nd Cir. 1998) (media contact policy of city social services agency held unconstitutional in context of criticisms made to media by employee during lunch hour and outside official premises) (*see supra* at 16); *Burnham v. Ianni*, 119 F.3d 668 (8th Cir. 1997) (photographs contributed by professors to student-organized display held to be constitutionally protected using forum analysis); *Weaver v. United States Info. Agency*, 87 F.3d 1429 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1251 (1997) (requirement that employees in foreign policy agencies make pre-publication submission of materials on matters of official concern upheld as constitutional). In sum, there is no conflict.

Petitioners also argue that the scope of the term "lascivious" may be difficult to discern. Pet. at 22. But, even in the more stringent context of criminal law, this Court has already rejected as "insubstantial" the argument that the term "lascivious" is vague. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78-79 (1994). Moreover, the questions presented by petitioners do not raise a vagueness issue.

Finally, petitioners complain about the Act's requirement that agency approvals be subject to the Virginia Freedom of Information Act ("FOIA"). Pet. at 22-23. Yet, they disclaim any intent to find *constitutional* fault with that requirement. Pet. at 23, n. 17.[7] Moreover, the disclosure cases cited by petitioners involve purely private

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[7] Written approvals for employee work are public documents and, as such, are subject to the sunshine laws that apply generally to public documents in Virginia. *See* Va. Code § 2.1-340 *et seq.* The fact that the General Assembly took pains to

speech, not speech by public employees in the performance of their jobs. *See Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982) (Ohio statute requiring candidates to disclose sources and expenditures of campaign funds was unconstitutional as applied to nominees of minor party historically subject to government and private harassment); *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (Federal postal statute providing for destruction of foreign Communist propaganda, unless affirmatively requested by addressee, was held unconstitutional); *Denver Area Educ. Telecoms. Consortium v. FCC*, 518 U.S. 727 (1996) (Federal requirements of advance notice before transmitting cable programming containing patently offensive sex-related material were held unconstitutional.) Again, there is no conflict.

5. The Rationale Used By Chief Judge Wilkinson and Other Arguments Advanced by the Commonwealth Provide Alternative Bases For Upholding the Act.

The inappropriateness of certiorari is further illustrated by the alternative arguments advanced by the Commonwealth in support of the Act. Although not reached by the Fourth Circuit majority, these arguments remain valid defenses that petitioners would have to

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state expressly the applicability of FOIA is not a constitutional infirmity. On the contrary, the FOIA clause is a democratic, speech-enhancing part of the Act that furthers the interests of the public in knowing how their taxpayer resources are being used. *See Meese v. Keene*, 481 U.S. 465 (1987) (federal requirement that distributors of foreign propaganda be subjected to public disclosure advances First Amendment values and enhances public's right to know).

overcome in order to obtain a judgment that the Act is unconstitutional. For these reasons, too, the writ should be denied. These defenses may be summarized as follows:

Public Forum Analysis: The speech at issue here occurs on government property: state supplied computers. Thus, the constitutionality of any rules governing their use for private speech must be reviewed under forum analysis. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-49 (1983) (recognizing three categories of property that may serve as forum: (i) traditional public forum, (ii) designated public forum and (iii) non-public forum). State computers are dedicated not to public debate but to the official work of government agencies. They are neither a traditional public forum nor a designated public forum. They are, at most, a non-public forum, "where the state has maximum control over communicative behavior since its actions are most analogous to that of a private owner." *Paulson v. County of Nassau*, 925 F.2d 65, 69 (2nd Cir. 1991). "Control over access to a nonpublic forum can be based on *subject matter* and speaker identity so long as the distinctions drawn are *reasonable* in light of the purpose served by the forum and are *viewpoint neutral*." *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 806 (1985) (emphasis added).

The Act is viewpoint neutral. It restricts communications having "sexually explicit *content*." Va. Code § 2.1-805 (emphasis added). This restriction is a permissible subject matter regulation, especially since lasciviousness is not a viewpoint. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (rejecting claim that "offensively lewd and indecent speech" was related to

political viewpoint); *Board of Educ. v. Pico*, 457 U.S. 853, 871 (1982) (plurality opinion) ("an unconstitutional motivation would not be demonstrated" if school board removed library books because they were "pervasively vulgar" rather than because of "disfavored ideas"). *See General Media Comm. v. Cohen*, 131 F.3d 273, 282 (2nd Cir. 1997), *cert. denied*, 524 U.S. 951 (1998) (rejecting as "linguistic overreaching" claim that "lasciviousness" is a viewpoint).

The Act is also reasonable. By prohibiting state employees from indiscriminately using state computers for lascivious sexually explicit materials, the Act furthers the Commonwealth's legitimate interest in guarding the productivity of its employees and avoiding a hostile work environment. Moreover, by vesting authority to grant exceptions with agency heads, the Act appropriately relies on the officials who are most directly responsible for the work of the agencies, and who can be expected to grant exceptions when required by such work. *See United States v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926) (presumption of regularity in decisions by government officials).

(b) The Secondary Effects Doctrine: The secondary effects doctrine has been used by the Court to uphold zoning laws that ban certain lascivious, sexually explicit speech from designated neighborhoods. The Act is analogous in that it also bans sexually explicit speech from designated venues: state computers. In *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Court found a zoning law constitutional because, despite its apparent content-based approach, "the City Council's '*predominate* concerns' were with the secondary effects of adult theaters,

and not with the content of adult films themselves." *Id.* at 47 (emphasis in original). The Court identified the secondary effects to include (i) crime, (ii) injury to retail trade, (iii) depression of property values, and (iv) general deterioration in neighborhood quality. *Id.* at 48. The vitality of this doctrine was recently reaffirmed in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000).

The secondary effects of sexually explicit materials on state computers are analogous to those identified in *Renton*. They include (i) infringement of the workers' right to be free from sexual harassment in the workplace, (ii) exposure of the state to legal liability for a sexually hostile environment, (iii) injury to productivity, and (iv) general deterioration of professionalism and workplace quality.

(c) NTEU/Pickering Balancing Test: Even if petitioners could show that the *NTEU/Pickering* balancing test is applicable, they would not prevail unless they could also show that the balance must be struck in their favor. This they cannot do, as shown by the opinion of Chief Judge Wilkinson, who concurred in the judgment of the Fourth Circuit. *See* Pet. App. at 47a-66a. Chief Judge Wilkinson used the *NTEU/Pickering* balancing test advocated by petitioners and found the Act passes muster. Key to his analysis were the following elements:

- "[T]he General Assembly addressed a real, not a fanciful problem when it enacted the statute. The record is replete with examples of Internet web sites displaying graphic forms of sexual behavior." Pet. App. at 58. *See also* n.2 *supra*.

- "The posting of such material on web sites in state offices has led to workplace disruption and complaints that such sexually graphic matter contributes to a hostile work environment." *Id.*

- "The state thus has every right to require its employees to spend their workday energies on the functions for which it is paying them." *Id.* at 59a.

- "The recent revisions to the statute . . . have narrowed its scope considerably [and] . . . it now restricts a more limited range of material – mainly that which has as its dominant theme the lascivious depiction of nudity or sexual conduct." *Id.* at 59a – 60a.

- "[T]hrough the waiver process the Commonwealth . . . accommodates the various interests at stake – barring employee access to lascivious material generally, but providing a procedure that can be invoked whenever educational institutions determine that academic freedom so requires." *Id.* at 60a.

- "The significant state interest here is thus balanced against a minimal intrusion on academic inquiry. Under the Act, the ultimate judgment on whether a requested waiver is for a bona fide research project resides in the system of university governance." *Id.*

- "The Commonwealth thus *maintains academic freedom* by reposing critical authority *within the university* itself." *Id.* (emphasis added).

The balancing test undertaken by Chief Judge Wilkinson is closely tied to the facts of this record and thus does not lend itself to allegations that there is a conflict

among the circuits. Indeed, petitioners allege no conflict insofar as the Wilkinson opinion is concerned, but limit themselves to a tepid protest of his judgment in weighing the competing considerations. Pet. at 24-25. Petitioners' disagreement about the outcome of the balancing test does not make this case worthy of certiorari.

In sum, the Commonwealth has an array of strong alternative defenses that complicates petitioners' efforts to invalidate the Act and that makes certiorari inappropriate.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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